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March 2, 2006

## Ex Parte

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C.  
§ 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband  
Services, WC Docket 04-440**

Dear Ms. Dortch:

I am writing to respond to the *ex parte* that COMPTTEL submitted in the above-referenced proceeding on February 17, 2006.<sup>1</sup> COMPTTEL's filing responds to Verizon's February 7, 2006 submission in this proceeding that answered questions from the Commission's staff.<sup>2</sup> In particular, Verizon's *February 7 Letter* provided additional detail regarding the broadband services for which Verizon is seeking forbearance; described the types of Title II regulations that apply to those services and for which forbearance is therefore requested; discussed how these services meet the same criteria that the Commission identified in the *Wireline Broadband Order*<sup>3</sup> in permitting broadband Internet access and related transport services to be offered on a private-carriage basis, without the burdens of Title II; and provided additional data showing that the services at issue are highly competitive. COMPTTEL argues that the Commission should reject Verizon's forbearance petition, but each of its claims is misplaced.

1. COMPTTEL first claims (at 2) that the Commission should deny Verizon's forbearance petition because it rejected "the exact relief sought by Verizon" in the *Wireline Broadband Order*. But that order did not reject forbearance for the broadband services at issue here; it did not even address the question whether forbearance was appropriate for such services. Nor did the order determine that the broadband services at issue here must be subject to mandatory

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<sup>1</sup> Letter from Jason Oxman and Mary Albert, COMPTTEL, to Marlene Dortch, FCC, WC Docket No. 04-440 (FCC filed Feb. 17, 2006) ("*COMPTTEL Letter*").

<sup>2</sup> Letter from Edward Shakin, Verizon, to Marlene Dortch, FCC, WC Docket No. 04-440 (FCC filed Feb. 7, 2006) ("*February 7 Letter*").

<sup>3</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*").

common carriage regulation. As Verizon explained in the *February 7 Letter*, and as the reasoning of the *Wireline Broadband Order* establishes, they should not be.

The *Wireline Broadband Order* held that wireline broadband Internet access services are properly classified as information services subject to Title I; that the underlying broadband transmission services used to provide those services may be sold on a private carriage basis under Title I; and that providers of any of those services should have the flexibility to decide whether to offer them on a common carriage or private carriage basis. See *Wireline Broadband Order* ¶¶ 12, 86. To the extent the *Wireline Broadband Order* discussed the broadband services at issue here, it was merely to point out that such services were not properly classified as information services because “they do not inextricably intertwine transmission with information-processing capabilities.” *Id.* ¶ 9. The Commission did not address the question at issue here – whether, under 47 U.S.C. § 160, forbearance from mandatory Title II regulations would be appropriate for these competitive broadband services. Nor did the Commission make any factual findings with respect to the services at issue here that bear on whether it would be appropriate to permit Verizon to offer these services on a private carriage basis.

Although the *Wireline Broadband Order* did not decide the appropriate regulatory treatment of the broadband services at issue here, the *February 7 Letter* explained that these services meet the same criteria on which the Commission relied in eliminating mandatory common-carriage regulation for the broadband services addressed in that order. See *February 7 Letter* at 4-6. Verizon explained that the technology used to provide the broadband services at issue here “are fundamentally changing” in ways that are “rapidly breaking down the formerly rigid barriers that separate one network from another,” *Wireline Broadband Order* ¶ 32; that changes in the marketplace for the broadband services at issue here require that providers have “the flexibility to respond more rapidly and effectively to new consumer demands,” *id.* ¶ 79; and that the current regulatory environment discourages technological innovation with respect to the broadband services at issue here, *see id.* ¶ 65.

COMPTTEL does not dispute any aspect of this showing. It nonetheless claims (at 3) that the relief Verizon seeks here “stretches beyond” the relief that the Commission has granted for broadband services in the past. But as the *February 7 Letter* explained, the relief Verizon is seeking here is the same as the Commission already provided for broadband transmission services that are used to provide Internet access service in its recent *Wireline Broadband Order* and in its earlier *Cable Modem Order*<sup>4</sup> – namely, to permit providers of those services the flexibility to offer them on a common carriage or private carriage basis.

COMPTTEL’s only answer is to ignore this recent precedent and cite instead a decision from 1998 where the Commission stated it would be a “particularly momentous step” to forbear from enforcing sections 201 and 202 of the Act. But the Commission has already provided equivalent regulatory relief with respect to wireline broadband Internet access services and the underlying broadband transmission services used to provide those services. Moreover, since 1998, the Commission has conducted an evaluation of competition for the broadband services at issue here

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<sup>4</sup> *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 54-55 (2002) (“*Cable Modem Order*”).

in the context of removing unbundling obligations, and has recognized that these services can be provisioned by a wide variety of competing carriers. *See Triennial Review Order* ¶ 538. And, in the years since that decision, competition for these services has only intensified.

2. COMPTEL next argues that Verizon should not be granted forbearance for wholesale special access services, which COMPTEL's members use to provide their own broadband services. *See* COMPTEL Letter at 4-7. But as we explained in the *February 7 Letter*, the forbearance Verizon seeks here excludes traditional TDM-based special access services and those services will continue to be available as wholesale common carrier services. *See February 7 Letter* at 2 & Att. 1. In fact, none of the services that Verizon specifically identified for relief in the *February 7 Letter* is a traditional TDM-based special access service. Thus, COMPTEL's arguments about the availability of competitive wholesale alternatives for traditional special access, and its discussions of the Commission's findings about such services in the *Verizon/MCI Order*, are irrelevant to the relief Verizon has requested.

COMPTEL also complains (at 7-8) that Verizon fails adequately to explain what a TDM-based service or facility is. But the Commission itself has previously defined TDM facilities and services, and has distinguished between TDM services and the packetized services such as ATM and Frame Relay that are at issue here. In the *Triennial Review Order*, for example, the Commission found that "TDM provides a transmission path by dividing a circuit into time slots and providing a dedicated time slot to an end user for the duration of the call. More recently, carriers have started using packet-switched technologies (e.g., ATM or frame relay) to combine different types of traffic over shared facilities." *Triennial Review Order* ¶ 220.

COMPTEL tries to confuse the issue by noting (at 8) that Verizon's Frame Relay and ATM services may be provided over DS-1 and DS-3 special access facilities. This is irrelevant. The broadband services at issue here are provided primarily on a retail basis. In the case of Verizon, for example, more than 90 percent of Verizon's sales of ATM and Frame Relay are sold to retail customers (*i.e.*, directly to end users) as opposed to wholesale customers (*i.e.*, to other carriers). Verizon's wholesale ATM and Frame Relay services represent only approximately 2 percent of ATM and Frame Relay revenues attributable to enterprise and wholesale customers nationwide.

Moreover, the Commission has repeatedly treated retail broadband services such as ATM and Frame Relay as separate from the wholesale TDM-based special access services that are one of the inputs used to provide those services. *See, e.g., Verizon/MCI Order* ¶¶ 24, 57. As noted above and in the *February 7 Letter*, the Commission can take the same approach here, by defining the broadband services at issue to exclude traditional TDM-based special access. This approach would enable competing carriers to access traditional special access on the same basis they do today. Nothing in the requested relief would prevent competitive providers from using these TDM-based special access services to offer their own packetized services, such as ATM and Frame Relay. *See Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order, WC Docket No. 04-246, FCC 05-171, ¶ 11 (FCC rel. Oct. 14, 2005) (finding that competitive packet switching providers "purchase Verizon's special access facilities as inputs to their own retail advanced services").

3. There also is no merit to COMPTEL's claims regarding Verizon's factual showing for the broadband services at issue here. As we explained in the *February 7 Letter*, Verizon is not the largest provider of any of these services, but instead faces stiff competition both from a larger

competitor – AT&T – and from a long list of other significant competitors. Verizon provided extensive support for this showing, including the Commission’s prior findings that the services at issue are purchased primarily by enterprise customers, and that Verizon competes with a long list of competitors for enterprise services; statements from competitors in Verizon’s region indicating that they provide the services at issue; market-share estimates from Wall Street analysts and other third parties confirming that Verizon faces competition from a wide variety of providers for the services at issue; and Verizon’s internal analysis of national market share for enterprise customers with respect to certain broadband services. *See February 7 Letter* at 6-13 & Att. 3.

COMPTEL’s letter does not provide any contrary factual evidence of its own, despite the fact that its member companies obviously have access to extensive data regarding the services at issue. As a result, COMPTEL’s claim (at 6) that “Verizon does not explain where in its service territory” competitors are offering the services at issue cannot be taken seriously. In any event, regardless of where competing carriers are providing packet-switching services today, they are clearly capable of providing these services nationwide, as the Commission has found. *See Triennial Review Order* ¶¶ 537-541 (finding no impairment for packet-switched services nationwide); *see also id.* ¶ 202 (finding no impairment for OCn-level services nationwide).

COMPTEL also claims that Verizon has failed to provide data “to determine the level of cross elasticities of demand” between competitive service offerings and Verizon’s own. But there is no reason even to suspect that the Frame Relay, ATM, and other broadband services offered by competitors are in a different product market from Verizon’s comparable offerings. Competing carriers have both the incentive and ability to structure their service offerings to compete directly with Verizon and each other, and there is no reason to assume – particularly none provided by COMPTEL – that they have failed to do so. In any case, the Commission did not analyze cross elasticities of demand for the wireline broadband Internet access services granted relief in the *Wireline Broadband Order*, and there is no need to do so here. *See Wireline Broadband Order* ¶¶ 59-61.

4. Finally, COMPTEL argues (at 8-9) that Verizon should be considered a dominant provider of the broadband services at issue given Verizon’s past statements that AT&T, MCI, and Sprint *collectively* served about three quarters of the market for packet-switched broadband data services such as ATM and Frame Relay.<sup>5</sup> But the data on which Verizon relied for those previous statements consistently showed that AT&T accounted for the largest share of that total, and the data accompanying our *February 7 Letter* demonstrate that that continues to be the case today. Our recent data also show that, even when Verizon’s and MCI’s respective shares are combined, Verizon does not have a dominant share of any of the services at issue and faces competition from a wide number of providers. As Verizon has demonstrated throughout this proceeding, the broadband services at issue were competitive before the merger, and that remains true today.

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<sup>5</sup> COMPTEL also points (at 9) to Verizon’s recent announcement that it added 613,000 net broadband lines in 4Q2005, but this has nothing to do with the services at issue here. The total instead represents DSL and FiOS lines that are provided to mass-market customers and that were already granted relief from mandatory common-carriage regulation in the *Wireline Broadband Order*.

In sum, COMPTTEL fails to provide any basis for the Commission to disregard the showing that Verizon has made in this proceeding. The Commission should accordingly grant Verizon's petition and provide it with flexibility to offer high-speed packetized and optical broadband services on either a private carriage or common carriage basis so that it can better compete for the business of the sophisticated customers who buy these services.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script, reading "Dee May". The signature is written in dark ink and is positioned above the list of names.

cc: S. Bergmann  
B. Childers  
G. Cohen  
R. Crittendon  
W. Dever  
I. Dillner  
W. Kehoe  
M. Maher  
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